

REGION LEGAL SERVICE OFFICE NAVAL DISTRICT WASHINGTON **THE COUNSELOR**

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This edition of The Counselor includes topics that cover: new policies regarding illicit photo sharing, improper uses of administrative inspections, the process to change a discharge characterization, delivery of military personnel wanted by civilian authorities, and how to file a claim if your personal property is damaged during the course of your work. Also included are the Results of Trial for the 2nd and 3rd Quarter 2017. The articles are designed as a quick reference and overview on these subjects. Please do not hesitate to reach out to us for legal advice. A directory of Command Services Department Staff Judge Advocates is below.

NEW POLICIES PROHIBITING THE UNAUTHORIZED SHARING OF INTIMATE IMAGES

The Navy recently implemented new policies to prohibit the non-consensual sharing of nude photographs.

Illicit Photo Sharing

On April 18, the Acting Secretary of the Navy officially announced All Naval Message (ALNAV) 021/17, which added Article 1168 to the Navy Regulations and bans “the wrongful distribution or broadcasting of an intimate image.” This change makes a violation of this policy a crime that can be prosecuted. “Wrongful distribution” is defined as sharing something with the intent “to realize personal gain” or “to humiliate, harm, harass, intimidate, threaten, or coerce the depicted person” or shared “with reckless disregard.” An “intimate image” is “any visual depiction, including by electronic means, that includes another person who is identifiable from the depiction itself or from information conveyed in connection with the depiction; depicts that person engaging in sexually explicit conduct or depicts the private area of that person; and is taken under circumstances in which the person depicted had a reasonable expectation of privacy.”

On May 16, the Chief of Naval Personnel released NAVADMIN 119/17 announcing changes to the Military Personnel Manual (MILPERSMAN). These MILPERSMAN revisions added that any personnel who wrongfully distribute or broadcast intimate images will face mandatory administrative separation proceedings. Specifically, MILPERSMAN Article 1910-233, Mandatory Separation Processing, and MILPERSMAN 1910-142, Separation by Reason of Misconduct - Commission of a Serious Offense, have been updated to reflect this new policy for enlisted personnel who violate Article 1168. Officers who violate Article 1168 will be subject to administrative separation processing in accordance with Secretary of the Navy Instruction 1920.6C.

(Illicit Photo Sharing Continues on Page 2)

The Counselor

Illicit Photo Sharing

ILLICIT PHOTO SHARING (CONTINUED FROM PAGE 1)

These changes do not mean that Sailors who violate the new policy will automatically be kicked out of the Navy; instead, it means that they will undergo the separation process.

-written by LTJG Jared Hudson

Improper Administrative Investigations

IMPROPER USE OF ADMINISTRATIVE INSPECTIONS TO SEARCH FOR EVIDENCE OF A CRIME

You have been told that a Sailor in your command has been seen with alcohol in his barracks room. There is a health and comfort inspection scheduled for next week but you are worried that the Sailor will ditch the contraband before the inspection. The first reaction might be to reschedule the health and comfort inspection for the next day in order to solve the problem, but this may have some unforeseen consequences that could impact the ability to use discovered contraband as evidence at court-martial.

What is a health and comfort inspection and what happens if you find evidence during one?

Commanders have the ability to perform administrative inspections in order to ensure security, military fitness, or good order and discipline of the unit. A health and comfort inspection is a common example of this type of administrative inspection in order to ensure proper standards of cleanliness. During the course of an inspection, if any evidence of a crime is discovered, that evidence can be lawfully seized and is admissible as evidence at a disciplinary proceeding, such as a court-martial, Captain's Mast, or administrative separation hearing.

It is important that the purpose of the inspection is not to find evidence of a crime, but instead for the purpose of military fitness. Finding contraband or evidence of a crime is incidental to the actual inspection.

What happens when you reschedule the inspection based on suspicion of misconduct by a Sailor?

The purpose of the examination has now shifted from health and comfort, to a search for evidence. This means that it no longer fits the definition of an administrative inspection and any evidence found as a result likely would not be admissible at court-martial due to the improper search under Military Rule of Evidence 313. However, the seized contraband may be admissible as evidence at an administrative proceeding, such as an administrative separation board or board of inquiry. Please contact your staff judge advocate, installation staff judge advocate, or command services attorney if your command is considering using evidence of an improper inspection at Captain's Mast.

So what options does a command have?

- Ask for consent - if the Sailor consents to a search then any evidence found as a result will be admissible.
- Search authorization in the area to be searched – if the information leads the commander to a reasonable belief that evidence of a crime will be found in the area to be searched, then the Commander may find probable cause and authorize a search if they have authority over the area.
- Proceed with the accelerated health and comfort inspection – with the understanding that any evidence of a crime or contraband found as a result cannot be used at court-martial. The end result of what the command wants will be the determining factor of which action to take.
- Do nothing - there might not be enough information for probable cause, and the offense might not be serious enough to pursue.

(Improper Administrative Investigations continued on Page 3)

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Improper Administrative Inspections

IMPROPER USE OF ADMINISTRATIVE INSPECTIONS (CONTINUED FROM PAGE 2)

Each situation is unique and the available options depend on the facts. A Staff Judge Advocate (SJA) is a good resource because a SJA can provide the pros and cons of each available option in order to help a commander reach their desired outcome. Contact your SJA, installation SJA, or a command services attorney for any questions regarding these situations.

-written by LTJG Taylor Onik

Delivery of Military Personnel Wanted by Civilian Authorities

DELIVERY OF MILITARY PERSONNEL WANTED BY CIVILIAN AUTHORITIES

The handing over of a service member to civilian authorities, to include local or Federal police agencies, for apprehension or trial process is multifaceted and depends on a series of questions such as the location of the requesting jurisdiction, the type of warrant or court order, and the impact on good order and discipline and military justice procedures. There is a procedure for “delivery of personnel” under Article 14 of the UCMJ and outlined in Chapter VI of the Manual of the Judge Advocate General (JAGMAN). The article below gives broad guidelines, but it is a best practice to consult with your command SJA, installation SJA, or command services attorney.

Requirements for Delivery

When a command, to include the installation itself or tenant command, is approached by civilian authorities, the command should always ask if there is a warrant. For in-state authorities, the command should ensure they inspect the warrant and ask for law enforcement credentials. For out-of-state warrants, in addition to the above requirements, civilian law enforcement must provide either a warrant of extradition or a fugitive warrant before the command agrees to deliver the military member.

Delivery Agreements

Prior to authorizing delivery of a military member to civilian authorities, the member’s command must ensure a delivery agreement is completed by a judge advocate. A delivery agreement states that the commanding officer is turning the military member over with the understanding that the individual shall be returned to the command immediately upon dismissal of charges, acquittal at trial, or upon completion of a sentence following conviction. A sample delivery agreement is provided in JAGMAN appendix A-6-b. Upon execution of a delivery agreement, a copy should be sent to Office of the Judge Advocate General Code 14. A best practice is to first call Code 14, (202) 685-5450 or DSN: 325-5450, to establish the best method of transmittal. A delivery agreement is not required when turning a military member over to Federal authorities. Nevertheless, the command should still ensure there is a proper warrant and that proper credentials are provided.

Refusal of Delivery

A command should only consider refusing to deliver a military member to civilian authorities in limited circumstances. These include when the accused is being retained by the command for a pre-existing Federal prosecution; when military disciplinary proceedings (e.g., a court-martial) are already pending, and the command’s ISIC JAG concurs with refusing delivery; the requesting authority is a foreign government, depending on the status of forces agreement; or when the military member’s commanding officer concludes extraordinary circumstances exist. If a command refuses delivery, the command must notify OJAG Code 14, (202) 685-5450 or DSN: 325-5450, as well as the Region Commander by telephone or naval message followed and confirmed by letter setting forth a full statement of the facts.

In closing, delivery of personnel is a complex issue, and consultation with a judge advocate is strongly recommended should this issue arise in your command.

-written by LT Spenser Solis

The Counselor

How to File a Claim When Your Personal Property is Damaged While You Are at Work

HOW TO FILE A CLAIM WHEN YOUR PERSONAL PROPERTY IS DAMAGED WHILE YOU ARE AT WORK

After driving to your place of duty, you decide to use the parking spot near a tree adjacent to your building. When you return to your car in the afternoon, you notice that a very large branch from that tree fell on top of your car and caused damage to your front windshield. What can you do?

You could file claim pursuant to the Military Personnel and Civilian Employees Claims Act (PCA) (31 U.S.C. §3721). The PCA is a gratuitous payment statute and provides limited compensation for loss and damage to personal property incurred incident to service to the Department of Defense. The PCA is not intended to replace insurance. Claimants are required to file a claim against private insurance; however, claimants do not have to wait until the private insurance company settles their claim before filing a PCA claim. The PCA only allows payment up to the fair market value (FMV) (depreciated value) of lost or destroyed items. Personal property is defined as any type of tangible property that is not real property.

What qualifies?

A PCA claim for loss or damage to personal property will be considered incident to service if the possession of the property was reasonable and useful under the circumstances and the loss did not result from the claimant's negligence.

Who is a Proper Claimant?

The PCA covers all active duty service members and civilian employees of the Department of the Defense. It also covers reservists who are on active duty for training. Reservists who are not currently on active duty and all retired members may file a claim for damages under the PCA if loss or damage to their personal property occurred while they were on active duty.

What is the Filing Deadline?

A PCA claim must be filed within 2 years from date the incident occurred.

What are the Required Forms?

The two forms you need to file your PCA claim are the DD Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service, and the DD Form 1844, List of Property and Claims Analysis Chart. You can find these forms with filing instructions online through the Navy's Office of the Judge Advocate General website, www.jag.navy.mil (by selecting "Claims" under the Legal Services tab).

Where to File?

You should file your claim at the Personnel Claims Unit (PCU) at:

Personnel Claims Unit Norfolk
9053 First Street Suite 102
Norfolk, VA 23511-3605
Toll Free Number: (888) 897-8217
Email: norfolkclaims@navy.mil

-written by LT Richard Aviles

The Counselor

RESULTS OF TRIAL, 2ND AND 3RD QUARTER FY 2017

General Court-Martial

At a General Court-Martial in Washington, D.C., CS2 Tawana Hymes, USN was tried for multiple offenses, including one specification of abusive sexual contact. On 7 March 2016, the panel of members returned a verdict of guilty of abusive sexual contact. On 8 March 2017, the panel of members sentenced him to forfeit \$400 per month for 12 months, restriction for 60 days, and 90 days hard labor without confinement.

At a General Court-Martial in Washington, D.C., an E-4 was tried for one specification of aggravated assault, four specifications of assault consummated by battery, and one specification of destruction of non-military property. On 4 April 2017, the military judge returned a verdict of not guilty.

At a General Court-Martial in Washington, D.C., CS2 Michael A. Kuhns, USN pled guilty pursuant to a pretrial agreement to one specification each of attempted sexual abuse of a child and indecent conduct. On 11 May 2017, the military judge sentenced him to be discharged with a Dishonorable Discharge and to confinement for 24 months. Pursuant to the pretrial agreement, all confinement greater than 18 months is to be suspended. The suspended confinement may be served if the service member violates the terms of the pretrial agreement.

At a General Court-Martial in Washington, D.C., HM3 Randy W. Burger, USN pled guilty pursuant to a pretrial agreement to one specification of the wrongful use of a prescription drug and two specifications of assault consummated by battery. On 17 May 2017, the military judge sentenced him to reduction in rank to paygrade E-1 and to confinement for 45 days. The pretrial agreement had no effect on his sentence.

At a General Court-Martial in Washington, MASA Keara GonzalezStarks, USN pled guilty pursuant to a pretrial agreement to two specifications of sexual abuse of a child and one specification of obstruction of justice. On 23 June 2017, the military judge sentenced her to reduction in rank to paygrade to E-1, discharged with a Bad Conduct Discharge and to confinement for 4 months. The pretrial agreement had no effect on her sentence.

Special Court-Martial

At a Special Court-Martial in Washington, D.C., LTJG Corey S. Howell, USN pled guilty pursuant to a pretrial agreement to one specification of assault consummated by battery. On 12 May 2017, the military judge sentenced him to be reprimanded and to forfeit \$2000 pay per month for 6 months. The pretrial agreement had no effect on his sentence.